

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| SOUTH SUFFOLK RECREATION VENTURES, INC. | : | DETERMINATION |
| for Revision of a Determination or for Refund | : | DTA NO. 811079 |
| of Tax on Gains Derived from Certain Real | : | |
| Property Transfers under Article 31-B of the | : | |
| Tax Law. | : | |

Petitioner, South Suffolk Recreation Ventures, Inc., c/o Donald Rettaliata, Esq., 1770 Motor Parkway, Hauppauge, New York 11788, filed a petition for revision of a determination or for refund of tax derived from certain real property transfers under Article 31-B of the Tax Law.

Petitioner by its duly appointed attorney and representative, Howard M. Koff, Esq., and the Division of Taxation by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel), signed a waiver of hearing last dated July 8, 1993 and consented to have the matter determined based upon stipulated facts, documents and briefs. The Division of Taxation filed its exhibits, with copies to petitioner, on July 26, 1993. The parties filed an agreed stipulation of facts on or about September 28, 1993. The last scheduled date for filing of briefs was November 15, 1993. Both parties submitted briefs within the time prescribed. After due consideration of the evidence and briefs filed herein, Carroll R. Jenkins, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner is entitled to a partial refund of real property gains tax ("gains tax") paid, based on the fact that two years after the sale and transfer of its property, the parties renegotiated and reduced the selling price by \$500,000.00.

FINDINGS OF FACT

There is no disagreement on the facts. The stipulation of the parties has been incorporated

into the Findings of Fact.

On January 5, 1988, petitioner, South Suffolk Recreation Ventures, Inc., entered into a contract to sell certain real property located in Bayport, Suffolk County, New York ("the subject property") to RCP Properties, Inc. ("RCP") for consideration totalling \$2,275,000.00. As part of that consideration, petitioner agreed to take back a \$1,000,000.00 purchase money bond and mortgage.

The closing of this transaction, including execution of the purchase money bond and mortgage, and the transfer of the subject property to RCP, occurred on August 29, 1989.

On or about September 26, 1989, petitioner reported this real property transfer to the Division of Taxation ("Division"), and paid \$134,481.66 in gains tax upon a taxable gain of \$1,344,816.55. Neither party disputes that the gains tax, as computed and paid in 1989, was correct at that time.

On August 29, 1991 (i.e., two years after the closing), the parties to the 1989 transaction entered into a memorandum of understanding and executed a modification agreement ("the 1991 agreements") to the 1989 purchase money mortgage. The substance, purpose and intent of the two 1991 agreements was to reduce the 1989 selling price of the property by \$500,000.00. This reduction in price was accomplished by petitioner's forgiving \$500,000.00 of the original purchase money mortgage debt and reducing the face amount of that mortgage from \$1,000,000.00 down to \$200,000.00. RCP, in turn, agreed to pay petitioner the principal sum of \$100,000.00 as consideration for this amended agreement. The remaining \$200,000.00 (which was originally covered by the mortgage) would thereafter be payable by RCP to petitioner as an unsecured debt.¹

On August 7, 1991, petitioner filed a claim for refund with the Division. This claim urged that since the sale price of the subject property had been reduced by \$500,000.00, petitioner's gain had been reduced by the same amount. Therefore, petitioner claimed entitlement to a refund of gains tax in the amount of \$33,000.00. The refund claim was filed 22

¹There is no explanation in the record for petitioner's apparent altruism.

days before the mortgage note modification agreement was signed. However, once the mortgage note modification agreement had been executed, petitioner forwarded a copy to the Division for consideration as part of the refund claim.

The Division denied petitioner's refund claim by letter dated September 27, 1991, and thereupon petitioner filed a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). Petitioner's refund claim was denied by BCMS order (CMS No. 118858) dated June 26, 1992.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner argues that it is entitled to a refund based on the \$500,000.00 reduction in the selling price under the 1991 agreements. Petitioner argues that the reduction of the bond and mortgage by \$500,000.00

had the affect of reducing the total consideration paid to petitioner by RCP for the transfer of the property in 1989.

The Division argues that the renegotiation of the bond and mortgage had no impact on the gains tax petitioner was required to pay, since the gains tax is computed based on the consideration paid or required to be paid at the time of transfer of the real property.

CONCLUSIONS OF LAW

A. Tax Law § 1441 imposes a tax at the rate of ten percent on gains derived from the transfer of real property within New York State.

B. Tax Law § 1440.3 defines "gain" as the "difference between the consideration for the transfer of real property and the original purchase price of such property, where the consideration exceeds the original purchase price." Tax Law § 1440.5(a) defines "original purchase price" to mean:

"the consideration paid or required to be paid by the transferor; (i) to acquire the interest in the property, and (ii) for any capital improvements made or required to be made to such real property . . ." (emphasis added).

"Consideration", in turn, is defined by Tax Law § 1440.1(a) to mean:

"the price paid or required to be paid, for real property or any interest therein Consideration includes any price paid or required to be paid, whether expressed in a deed and whether paid or required to be paid by money, property or any other thing of value and including the amount of any mortgage, purchase money mortgage, lien or encumbrance, whether the underlying indebtedness is assumed or taken subject to" (emphasis added).

As the statute recites, consideration includes the amount of a mortgage, meaning its face amount and not its present value or other value (Matter of Normandy Associates, Tax Appeals Tribunal, March 23, 1989; see also, Matter of Old Farm Lake Company, Tax Appeals Tribunal, April 2, 1992).

C. Tax Law § 1442, at all times relevant hereto, provided that:

"The tax imposed by [Article 31-B] shall be paid by the transferor to the [commissioner of taxation] or to any agent of such commission[er] . . . on the date of transfer" (emphasis added).

D. Both the Division and petitioner agree that consideration paid for the transfer of real property is the price paid or required to be paid. However, petitioner urges that:

"In view of the price reduction (and the corresponding reduction in the amount of the purchase money mortgage) the subject \$500,000.00 has not been paid; nor is it required to be paid. Accordingly, such amount is not includable in consideration" (Petitioner's brief, p. 2; emphasis in original).

That being the case, says petitioner, its "gain" from the 1989 transaction was similarly reduced by \$500,000.00. Petitioner concludes that it would be contrary to the intent of the statute to impose tax on a "gain" it never actually received.

E. There is no dispute between the parties that, at the time of the transfer of the real property in 1989, petitioner's taxable gain was properly computed at \$1,344,816.55 and the gains tax due was properly computed at \$134,481.66.² It is only the result of the two 1991 agreements reducing the selling price which has led petitioner to conclude that it has overpaid the gains tax due.

F. Contrary to petitioner's argument (Conclusion of Law "D"), this case does not rest upon what may or may not be included in computing total consideration. Rather, the

²The computation showing how these figures were arrived at is not in dispute and is not shown for that reason.

disposition in this case rests upon the answer to one question, i.e., "At what point in time do we measure, for gains tax

purposes, the value of consideration paid or required to be paid (and the resulting gain) for the transfer of real property?"

G. That question was answered in Matter of Cheltoncort (Tax Appeals Tribunal, December 5, 1991, confirmed 185 AD2d 49, 592 NYS2d 121 [3d Dept 1992]). In Cheltoncort, the Tribunal stated that:

"In calculating the amount of tax due upon a taxable transaction, the value of the consideration has to be determined at the time of the transfer in order to finally fix the tax owed. Subsequent events do not alter the value that the consideration had at the time of the transfer" (emphasis added).

In Matter of V & V Properties (Tax Appeals Tribunal, July 16, 1992), the Tribunal considered an analogous (though converse) situation. There, the petitioner sought to include in consideration (for purposes of calculating its original purchase price) certain liabilities it had assumed from its seller upon its acquisition of real estate. Though it appeared the petitioner in V & V may not in fact have ultimately paid such liabilities, the Tribunal nonetheless allowed the same as part of consideration, holding that original purchase price includes "any consideration paid or required to be paid by the transferor." The Tribunal noted that:

"[W]hether petitioner has paid this amount is not determinative, but rather, the determinative factor is whether petitioner was required to pay this amount at the time the transfer occurred. Subsequent events do not affect the amount of liability assumed by the petitioner at the time it acquired the property" (emphasis added).

A footnote included in the Tribunal's decision in V & V specifically affirmed this holding as being consistent with prior Tribunal decisions holding that the amount of consideration must be determined at the time of transfer and cannot be reduced based on subsequent events (citing Matter of Cheltencort Co., supra; Matter of Perry Thompson Third Co., Tax Appeals Tribunal, December 5, 1991, confirmed 185 AD2d 49, 592 NYS2d 121 [3d Dept 1992]). In sum, "gain" subject to gains tax is computed as the difference between the original purchase price and the consideration (including the face amount of any mortgage) determined as of the date of the

transfer. In the instant matter, petitioner's gain and the tax arising therefrom, was properly computed upon consideration paid or required to be paid at the time of transfer of the property (Finding of Fact "4", Conclusion of Law "E"). Neither party to this proceeding has disputed that fact. Petitioner's argument that the calculation of its gain in 1989 must be reduced based on the 1991 reduction in the purchase money mortgage, defies the holding in Cheltoncort.

H. The petition of South Suffolk Recreation Ventures, Inc. is denied, and the denial of refund dated September 27, 1991 is sustained.

DATED: Troy, New York
March 10, 1994

/s/ Carroll R. Jenkins
ADMINISTRATIVE LAW JUDGE